DOCUMENT RESUME

ED 272 997 EA 018 731

AUTHOR Baldwin, Grover H.
TITLE Management Prerogatives and the Scope of Public School Bargaining.
PUB DATE 86
NOTE 20p.; In: Jones, Thomas N., Ed. and Semler, Darel P., Ed. School Law Update, 1986 (EA 018 725).
PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Administrative Policy; Board of Education Policy; *Collective Bargaining; Court Litigation; Elementary Secondary Education; Government School Relationship; *Labor Relations; Legal Responsibility; Power Structure; *Public Schools; School Community Relationship; School District Autonomy; School Law; *School Personnel; *Scope of Bargaining; State Legislation

ABSTRACT

Examination of the scope of management prerogatives in negotiation raises the question of available guidelines for school boards. State legislation indicates that the scope of bargaining ranges from narrow restrictions to broad capabilities. Management prerogatives include the power to oversee budgets and hire and dismiss employees. School officials must address the general statutes to determine the scope of their powers. Intent of state legislation is used as a base for court construction of what constitutes management prerogatives in bargaining. In most states, this intent gives broad powers to school boards. "The balancing test" means that courts examine issues within the scope of bargaining and balance the effects on groups within the school community. Courts consider the governmental policy-making nature of the school board and examine issues in light of differences between private sector enterprise and the public entity. "The impact test" determines whether school management or the employee is affected more by an issue. Under this test, courts rely on specific wording of state statutes and on rational decision making. Although courts use tests in determining management prerogatives, the area lacks a definitive statement on time limitations. The trend is toward increasing management prerogatives and a lessening of conflict in educational and governmental policy making. (CJH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED272997

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.
Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY
T. Jones
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

6

Management Prerogatives and the Scope of Public School Bargaining

Grover H. Baldwin

Throughout the history of collective bargaining there has been a problem of what constitutes negotiable items. The conflict arises in the private sector with sections 158(a)(5) and 158(d) of the NLRA posing a recurring battleground between management and labor. Section 158(a)(5) provides for an unfair labor practice if an employer refuses to bargain collectively with the representatives of the employees. While appearing straightforward, the conflict comes when viewed in conjunction with section 158(d), which defines collective bargaining as

> the performance of a mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment.[1]

The courts have dealt with this conflict and recognize that it will not go away. Justice Stewart, in his concurring opinion in the *Fibreboard* case, felt that

> [T]he phrase 'conditions of employment' is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. ... If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[2]

Furthermore, Justice Stewart raised the issue of congressional intent in the NLRA and the need for excluding management functions from the bargaining table. However, the confusion and conflict did not end with *Fibreboard*, and subsequent decisions called upon various appellate courts to deal with the issue of congressional intent and set parameters for the scope of bargaining.

In 1967, the Fourth Circuit Court dealt with this issue. It found that it had to examine the intent of Congress in passing the NLRA. At issue

EA 018 731

1. National Labor Relations Act §§158(a)(5), 158(d) (1983).
2. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), at 221, 223.

was the price increase by a private contractor for food services in the Westinghouse plant.[3] The union objected, feeling that such an increase fell under the rubric of terms and conditions of employment and had to be negotiated. In holding that such an item was beyond the scope of bargaining, the court stated that "it was not the intent of Congress... to sweep every act by every employer with the ambit of 'conditions of employment'."[4] Rather, the court felt that equating such trifles with the more important areas of negotiations, such as job security, wages, and insurance, was beyond the scope of congressional intent.

However, the problem did not resolve itself, nor did it leave the court's domain. While a cap may have been put on the issue of congressional intent, the dual sections caused problems within other areas. Specifically, the issue was the management functions and the operation of public agencies. As early as 1952 this area was a cause for concern.[5] In the *American National Insurance Company* case, the Supreme Court dealt with the issue of managerial functions and responsibilities as they pertained to the collective bargaining process. Here, the issue was a grievance procedure that ended in an unlimited arbitration mode for resolving disputes. The company objected, as they felt it was beyond the scope of bargaining. They proposed a management clause that excluded items of promotions, discipline, and work scheduling, as they were management prerogatives and beyond the scope of bargaining. The union objected and claimed an unfair labor practice stating that the management clause denying them their right to bargain on terms and conditions of employment was unfair. The Court, in resolving the issue in favor of management, found that bargaining for a management rights clause that contained certain functions pertinent to the management of the operation was not, per se, a violation of the NLRA and did not erode the duties and functions of the Act. Again, the union did not have to agree to the clause at the bargaining table, but mere proposing and demanding that position did not constitute an unfair labor practice. Later, in the *Katz* decision, the Court held that a refusal to negotiate in fact as to any subject within section 158(d), violated section 158(a)(5) even though the employer had a desire to reach an agreement.[6] However, the Court did not preclude negotiation of a management rights clause.

The second problem lies in the fact that private sector management has more latitude to negotiate than does public sector management. While both have mandatory items that must be negotiated, the public sector management has certain areas that may not be negotiated under statutory restraint. While private sector management *may* choose to negotiate its management rights to achieve labor peace and harmony, similar items may well be outside the realm of possibility for public sector management.

3. Westinghouse Elec. Corp. v. NLRB, 387 F.2d 542 (4th Cir. 1967).
4. *Id.* at 550.
5. NLRB v. American Nat'l Ins. Co., 72 S. Ct. 824 (1952).
6. NLRB v. Katz, 369 U.S. 736 (1962).

In 1983, the District of Columbia Circuit Court dealt with the issue of promotion rights of employees within the federal government who had been demoted through reduction in force.[7] The federal agency refused to bargain, as it felt it was inconsistent with federal law (5 USC section 7106) which outlined responsibilities of the agency. These included the right of the agency to hire, assign, direct, lay off, and retain employees and to fill positions from properly ranked and certified candidates for promotion. The union wanted management to negotiate the procedures the agency had to observe in exercising its authority under this section. The court raised the "direct interference" criteria and recognized the dichotomy between substance and procedure. The key was the degree to which the negotiation of procedure impinged on management's right. The confusion is expanded with the merging of management rights, congressional intent, and the rights and responsibilities of the public sector employer in fulfilling its function.

Legislation

While we have seen the beginnings of the problem for the private and federal sector, what does it portend for public sector schools and management? We must begin by looking at the collective negotiations laws for public schools. These laws, while they have been strengthened in terms of specificity of management rights, began by being as vague as the NLRA in defining wages, hours, and terms and conditions of employment. Indeed, it appears that states adopted the NLRA definitions without considering the issues the courts had dealt with in attempting to define negotiable issues.

Typical of the early attempts was the Pennsylvania law, Act 195.[8] This law provided for negotiations at reasonable times and in good faith concerning wages, hours, and terms and conditions of employment. However, in sections 702 and 706 the Pennsylvania legislature defined a management rights clause and the bounds the public school management could not exceed. Section 702 stated

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours, and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.[9]

---

7. American Fed'n of Gov't Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Auth., 702 F.2d 1183 (D.C. Cir. 1983).
8. 1970 Pa. Laws 195.
9. *Id.* at 702.

Section 706 added specific item to the management rights, that of the employer's right to hire employees and discharge employees with just cause consistent with existing legislation. This expanded the rights of the employer, but created confusion as to the exact nature of both the scope of bargaining and the management rights clause.

In ensuing years, additional states enacted statutes dealing with collective bargaining and the issue of management rights. Representative statutes indicating attempts to define the management rights of public sector employers include the states of Hawaii, Indiana, Iowa, and Wisconsin. The Hawaii statutes, as of the 1984 amendments, included rights of the public employer to

> (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.[10]

While Indiana statutes included wording similar to the Hawaii statute, they added some specifics that have been used to expand the scope of management prerogatives. These included the "responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law" and further included specific rights to establish policy; maintain efficiency in school operations; and take actions necessary to carry out the mission of the public schools.[11]

A review of Iowa statute finds that it included the above rights, and added others to broaden these areas. The legislature added the power to "determine and implement methods, means, assignment, and personnel by which the public employer's operations are to be conducted."[12]

Another attempt to clarify the area of management rights and the scope of bargaining can be found in the early Wisconsin statute.[13] In section 111.70(1)(d), the legislature exempted from the scope of bargaining management direction of the governmental unit except as the exercise of such functions affected the wages, hours, and conditions of employment. The statute went further and declared that

> [T]he public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure

10. Hawaii Rev. Stat. § 89-9(d) (1984).
11. Ind. Code Ann. § 20-7.5-1-6(b) (1975).
12. 1974 Iowa Acts 1095, 7.
13. Wis. Stat. Ann. § 111.70.

> orderly operations and functions within its jurisdiction, subject to those rights secured to public employees.[14]

It would appear that these efforts would stop the flow of management rights cases, as states have limited the scope of bargaining by expanding the rights of management. Such is not the case. Even with specific areas within state statutes, suits by public employers and employees seek to limit and expand the scope of bargaining, much as Justice Stewart opined in *Fibreboard*.

The three "tests" that might be used to deduce the management prerogatives in negotiations with employee associations are: (1) legislative intent, (2) balancing, and (3) impact tests that the courts have used in determining the rights of both parties in negotiations.

Legislative Intent

Legislative intent has been a key to define the limits of negotiable items. Courts have looked at the legislative history of the state acts to discern the philosophy and belief of the legislature. This is particularly true where the sections of the various laws are nebulous and lacking in descriptive terms that could guide both parties at the table. One of the cases of the New Jersey trilogy cases – *Dunellen* – used this application.[15] In *Dunellen*, the issue was whether the proper resolution of an attempt to consolidate chairmanships of social studies and English into a humanities department was the proper subject of arbitration. In resolving the *Dunellen* issues, the Supreme Court of New Jersey reviewed the intent of the legislature and declared that

> Surely the Legislature, in adopting the very general terms of L.1968, c. 303, did not contemplate that the local boards of education would or could abdicate their management responsibilities for the local educational policies or that the State educational authorities would or could abdicate their management responsibilities for the State educational policies .... On the other hand it did contemplate that to the extent it could fairly be accomplished without any significant interference with management's educational responsibilities, the local boards of education would have the statutory responsibility of negotiating in good faith with representatives of their employees with respect to those matters which intimately and directly affect the work and the welfare of their employees.[16]

The result of *Dunellen* was that assignment of work, outlining schedules, and determination of the types of specialist to employ, all fell within the management prerogative arena.

---

14. *Id.* at § 111.70(1)(d).
15. Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 311 A.2d 737 (1973).
16. *Id.* at 741.

Further items in the laundry list approach to dispute resolution can be found in the *Aberdeen* case.[17] A South Dakota court rejected items the association wanted included under the mandatory topics area. The items sought included elementary planning time, elementary conferences, teachers' aides, budget allowances, school-wide guidance and counselling services, and mandatory retirement. The court held that these were not material items that could rationally be attached to the legislature's intent of wages, hours, and terms and conditions of employment. The court also indicated that the boards of education should concern themselves with items affecting wages and hours and not be involved with items that were petty, were used for harassment purposes, were not of material substance, or were not directly part of the bargaining process. In 1985, the South Dakota Supreme Court overruled the *Aberdeen* case and expanded the list of management prerogatives previously excluded from negotiations.[18] The policy area included was overtime pay when combined with workload limits. The court said that the overtime must be negotiated when it was beyond a specified limit of teaching periods, subject matter preparations, teaching beyond specified subject matter limitations, and contact time with students at the elementary level. The court based its ruling on the tripartite test found in the *IFPTE* case discussed below.

In examining legislative intent for the negotiations process in Delaware, the Chancery Court held in *Newman* that the legislature did not make state statutes negotiable items in the public schools.[19] Therefore, the claim that the board had to provide a nontenured teacher a grievance hearing was beyond the scope of the negotiations law, as it was not provided for in state statute.

In dealing with teacher transfer policy as an issue in the negotiations process, the Supreme Court of Minnesota held that this was outside the prescribed limits adopted by the state legislature in establishing the negotiations law.[20] The court believed that while inherent managerial policy was not clearly enunciated in the law as to the specific items that were mandatorily negotiable, the functions and programs of the employer, organizational structure, and selection and direction and number of personnel, were part of that arena. it was clear, to the court, that in the selection and direction of personnel, the legislature meant that the board should have direction over the broad educational objectives of the district. Transfer was a managerial decision, and hence, nonmandatorily negotiable. However, the criteria and procedures for determining which teachers will be transferred is negotiable, as it directly affects the

17. Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., Aberdeen ISD, 215 N.W.2d 837 (1974).

18. Rapid City Educ. Ass'n v. Rapid City Area School Dist. No. 51-4, slip op. No. 14522 (S.D. 1985).

19. Newman v. Board of Educ. of Mt. Pleasant School Dist. 325 A.2d 387 (1974).

20. Minneapolis Fed'n of Teachers, Local 59 v. Minneapolis Special School Dist. No. 1, 258 N.W.2d 802 (1977).

welfare of the teacher. This impact philosophy will be reviewed later in this chapter.

A different tact was taken in Iowa, where the court, in dealing with a laundry list of items, found that the legislature intended to have all negotiable items listed.[21] In the *Fort Dodge* case, the court held that if it wasn't on the list, it could not be negotiated, and those parties that did negotiate a nonlisted item, would be in violation of the law. The court, in ruling that the school board was correct in not negotiating the issue of a retirement program, held

> that the act's wording and legislative history indicated an intent to retain broad employer rights and to carry out specific, narrowly defined, exceptions for mandatory negotiations.[22]

This belief was echoed in the *Tri-County* decision, where the Supreme Court of Kansas held that matters fixed either by statute or by Constitution are not negotiable under any circumstances.[23] These items included nondiscrimination; transfer and reassignment; evaluation of employees; dismissal procedures; allocation for books, supplies, and equipment; paraprofessional aides; substitutes (orientation, pay, preparation, qualifications); class size; and teaching materials. In dealing with the issue of number of credit hours needed to move up on a salary schedule and the claim that this was inexorably tied to wages, the Supreme Court of Iowa denied the educational association's claim and established a two-part test for their use.[24] This included the fact that "the proposal must come within the meaning of one of the subjects listed as mandatory" and that "there must be no legal prohibition against bargaining on the particular topic."[25] Hours, in this sense, did not constitute hours for wages and hence did not meet the first of the two-part test.

Facing declining enrollments, school districts need to take action to preserve the integrity of their organizations. This involves the restructuring of the organization to adequately utilize resources, including administrative personnel. The issue of the effect such reorganization has on the individual, and the place of managerial prerogatives, was addressed by the Supreme Court of Minnesota in 1981.[26] In restructuring the organization, and reducing administrative personnel without negotiating terms and conditions of employment, the district claimed that these were managerial rights. The court held that under section 179.66, subdivision 1,

---

21. City of Fort Dodge v. IPERB, 275 N.W.2d 393 (1979).
22. Tri-County Educator's Ass'n v. Tri-County Special Educ. Coop. No. 607, 594 P.2d 207 (1979).
23. Charles City Educ. Ass'n v. PERB, 291 N.W.2d 663 (1980).
24. *Id.* at 668.
25. Fort Dodge Community School Dist. v. PERB, 319 N.W.2d 181 (1982).
26. Minneapolis Ass'n of Administrators and Consultants v. Minneapolis Special School Dist. No. 1, 311 N.W.2d 414 (1981).

> [A] public employer is not required to meet and negotiate on matters of inherent managerial policy which include, but are not limited to, such as discretion or policy on the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel.[27]

The decision to decrease administrative personnel as a means of dealing with declining enrollments, and a reduced budget, concern the school district's organization. These are, without question, matters of inherent managerial prerogatives.

A reversal of sorts came about in the *USD 501* case in 1984 when the Kansas Supreme Court ruled on the issue of mandatory bargaining items.[28] The Kansas law provided a lengthy list of specific items delineating mandatory items for negotiations. Here, the school board held the belief that if it did not appear on the list, it was not a mandatory item for negotiations and beyond the scope of their responsibility. The court dealt the use of legislative intent a blow by holding that the "topic" approach adopted by the Secretary of Human Resources was a proper approach to determining the validity of an item for negotiations, even when it did not fall within the list outlined by the legislature. The court stated that "[A]ll that is required is that the subject matter ... be within the purview of one of the categories listed under terms and conditions of professional service."[29] This topic approach was expanded to include a case-by-case approach with the West Ottawa suit that sought to define the limits of mandatory subjects for bargaining under the Michigan law.[30]

Given the above, it is apparent that the courts have adopted legislative intent as a means of specifically limiting the items that can be considered mandatorily negotiable by employers in public schools. While the policy and structure of the organization may not be mandatorily negotiable, the balance between managements' rights and the effects on the employees is still an area that needs exploration. Before we move to those areas, we need to recall that even where the legislature has adopted specific language regarding the nature of the items that must be negotiated, as times and conditions change within education, so do the courts' attitudes. This was witnessed by the topic and case-by-case approach used by various state courts.

The courts' use of legislative intent is but one means by which items have been declared managerial prerogatives and thus beyond the scope of negotiations. Related to this approach is the act of balancing the interests of the various groups affected by the process. While the impact test deals with the effect of decisions on employers and employees, the

---

27. *Id.* at 476.
28. Unified School Dist. No. 501 v. Secretary of Kansas Dep't of Human Resources, 685 P.2d 874 (1984).
29. *Id.* at 875.
30. West Ottawa Educ. Ass'n v. Board of Educ., 337 N.W.2d 533 (1983).

balancing test includes other persons affected by the negotiations process, and appears to be an outgrowth of the legislative intent approach.

Balancing Test

The balancing test is one that goes beyond the "normal" range of impact (1) to assess the role of the governmental agency within political realities and (2) to assess who has the greater concern for the operation of the district. It takes into account the governmental nature of public school management that is quite different from the private sector negotiations posture. While the NLRA permits mandatory and permissive items for negotiations in the private sector, the permissive sections are limited only by the management's willingness to "give up" certain areas of direct control. This is not the case in the public school arena. Here the role and function of a governmental entity limits the range of permissive items.

This dichotomy is seen in the *West Windsor Township* ruling in 1978 where the Supreme Court of New Jersey recognized the dual role played by governmental entities, including public schools.[31] These roles include both the employer and governmental policy-making role. In the former, the agency must respond in reasonable fashion to the negotiations process. The court, in viewing the latter role, held that

> [T]he determination of governmental policy at the negotiating table or in a grievance resolution procedure is inherently antithetical to our system of government. Only with respect to those matters as to which government acts as an employer are the interests of the public employees sufficient to warrant the slight deviation from the political process resulting from mandatory collective negotiations.[32]

This dual role precluded the governmental agency from expansively opening items for negotiations that approached the permissive realm of the private sector employer.

The New Jersey court went further in its ruling in the *IFPTE* case and provided additional guidance in this balancing area.[33] Examining the issues of contracting and subcontracting, transfer and reassignment of workers, and the workweek provisions of the contracts, the court ruled that the effect was a proper subject for negotiations. The court also examined the role and responsibilities of the government as a policy-making body and held that federal precedents from the private sector would be inappropriate as guidelines in government entity cases. The rationale was based on the nature of the government's responsibility as a policy-making body and in light of the competing interests of the state and its employees where an issue would be best decided through the political process. Thus, the court held that issues were negotiable

31. Township of West Windsor v. PERC, 393 A.2d 255 (1978).
32. *Id.* at 263.
33. Local 195, IFPTE v. New Jersey, 443 A.2d 187 (1982).

where they affected the work and welfare of the employee and "on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy."[34] Continuing in the vein established in *West Windsor*, the court found that the requirement of significant interference was designed to balance the interests of the employees and the democratic decision-making powers given the government as elected representatives of the people. Where the governmental policy-making powers would be inhibited by the negotiated agreement, the item was one that could not be reasonably included within the negotiations process.

Turning to the federal government, we find that the USDC for the District of Columbia applied the same rationale found in *West Windsor* and *IFPTE* to the government's requirement to negotiate with federal employees. In *AFGE v. Federal Labor Relations Authority & OPM*, the court held that while procedural aspects of substantive rights of employees under governmental policy must be negotiable items (in this case regarding selection of personnel and resinstatement of RIF'ed personnel, an issue becoming important in schools), the court did not find that all such items fell under this rubric.[35] The court applied a direct interference test and was content to assert that a proposal would be nonnegotiable if in its implementation it would directly interfere with the agency's basic right of management. The issue of basic right of an agency to manage the workload, and fulfill the mission of the agency as deemed necessary and basic under the democratic form of government, took precedent over the needs of the employee. The court held that where it is a basic right of management to operate the agency (or school district) in a responsible fashion to the advantage of the taxpayer, that the political process and not the negotiations process is the more appropriate route for public employees to take to change governmental policy. With recognition of the balancing test based on the rights and duties of the governmental agency to manage the operation for the benefit of the electorate, we now turn to the public school and see how this test has been applied.

In *Chambersburg ASD v. PLRB* the issue was a no-smoking rule instigated by the school board.[36] The rule applied to all schools and in all places in the schools. Claiming that this was an unfair labor practice, the association and AFSCME (representing the custodial staff) sued for relief. In examining the balance between employee desires and the board's role in establishing an educational policy, the court held that educational policy was served in this instance. The key appears to be the long-standing attention given to the problem by the board. They had

34. *Id.* at 192.

35. Local 32, AFGE v. Federal Labor Relations Auth. & OPM, 728 F.2d 1526 (D.C. Cir. 1984).

36. Chambersburg Area School Dist. v. PLRB, 430 A.2d 740 (1981), *cert. denied*, 446 A.2d 603.

previously established an ongoing school program against smoking, made the policy part of the regulatory scheme for the students, sought to have adults model appropriate behavior for students, and granted recognition to nonsmokers' rights. Due to the educational policy precedents that had been established, the court found that these concerns of the board outweighed the instant concerns of the employees.

In matters that deal with constitutional rights of individuals, even where they affect the work and welfare of individual employees, these rights must be protected to the exclusion of that item from the negotiations process. In dealing with the item of racial discrimination in hiring, the New Jersey Superior Court looked at the extent to which the negotiations of the item would impair the determination of governmental policy, in this instance, not only local school board, but national policy as well.[37] In holding that there were three categories of items for the collective negotiations process (mandatory, permissive, and illegal), the court found that such an item as the one under scrutiny, could not be a legitimate negotiations item. The rationale offered was that

> [W]hen the dominant issue is (a governmental) goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration ... even though this may affect or impact upon the employees' terms and conditions of employment.[38]

Thus, where a larger goal is at issue, even the effect of the item on the employees' rights does not outweigh the goal of the governmental entity to fulfill its obligations to the Constitution and to the electorate.

Lastly, in the balancing realm we deal with the *Wright* decision.[39] While the Supreme Court of New Jersey held for Wright in his attempt to be reinstated with tenure according to the contract provisions negotiated by the board, the court did establish a "significance" criterion useful in determining further management prerogatives. Recognizing that all policy decisions by school boards would affect employees, the court felt that the key was to strike a balance between the interests of the public employee and the requirements of the democratic decision-making process. To do this, the court believed that items would be found to be nonnegotiable where they significantly interfered with the prerogatives of management. In determining significance, the court found that it rested predominantly on the extent to which students and teachers were involved. Where students were involved to a greater extent than the employment rights of teachers, the court held that the item was a management prerogative and beyond the scope of negotiability. In this case, which turned on a contract provision that was in contravention to state statute, the court held that as the tenure statute did not preempt the board's power to grant tenure after the three-year probationary

37. Teaneck Bd. of Educ. v. Teaneck Teacher's Ass'n, 448 A.2d 487 (1982).
38. *Id.* at 491.
39. Wright v. Board of Educ. of East Orange, 491 A.2d 644 (1985).

period, it was a permissive item for negotiations which did not significantly interfere with educational policy. Thus, one could negotiate beyond the state statute unless strictly prohibited from doing so. Furthermore, once the contract was agreed upon, the board had to live with the results. Thus, the significance criterion was established and provides a basis for determination of what a board must, may, or must not negotiate.

Impact Test

The third major test applied by the courts is the impact test. While alluded to in the discussion on balancing, it does provide a separate and distinctly different approach to items as they are examined in a topic, or case by case, approach and the effects on the parties are considered.

There are several cases from the private sector that demonstrate the impact test and provide guidelines for its use by the courts. These are divided into two different realms – management concerns of an entrepreneurial nature and specific issues pertinent to the negotiations process. In the *Transmarine* case, the Ninth Circuit Court looked at the right of management to restructure the company due to the changed economic conditions.[40] Here the company decided to restructure the firm and reinvest the capital in another enterprise in a different location and sought to have this "right" not be part of the negotiations process. Basing its ruling on both the *Royal Plating and Polishing Company* and the *Rapid Bindery* decisions, the court held that a decision of this type, dealing with such a fundamental issue as the basic direction of the company, was not a proper subject for mandatory collective bargaining.[41] However, the court did recognize the necessity of the company to bargain about the effects of the decision on the employees as it covers such issues as severance, vacation pay, insurance, seniority, and pension issues. Thus, the basic management decision about the structure and direction of the firm was not negotiable, but the effects of the decision were proper subjects for negotiations. While singularly a private sector matter, the basic principles do apply to public school operations within the management and governmental policy realm.

This decision was echoed in the *International Harvester* decision by the Ninth Circuit Court in 1980.[42] The court again held that the reorganization of the firm was not a negotiable decision. However, the effects of the decision on the wages, hours, and terms and conditions of the employees were negotiable items. The court said

> [M]anagement decisions that fundamentally alter the direction of an enterprise, or involve significant reallocation of capital generally are

40. NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967).
41. NLRB v. Royal Plating and Polishing Co., 350 F.2d 191 (3d Cir. 1965); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961).
42. NLRB v. International Harvester Co., 618 F.2d 85 (9th Cir. 1980).

> not considered decisions concerning terms and conditions of employment *and are not mandatory subjects of bargaining.*[43]

In negotiating the effects of the policy decision, the court was most concerned with the procedures for layoffs, reimbursement, and the other aspects that the decision would have on employees.

These two decisions have impact on public school management rights and prerogatives. Faced with declining enrollments, teacher shortages, financial exigency, school management and policy setting bodies need to adjust their operations to more efficiently and effectively fulfill their responsibilities to the students and patrons of the district. Using the rationale from these cases would permit these bodies to make the changes necessary. While they would not have to negotiate the issues, they would provide for the effects they have on personnel.

The issues raised in the private sector cases have risen in the public school arena, with the application of the impact test resulting in decisions similar to the "effects on employees" cited above. One of the earliest cases dealing with the distinction between board and employee rights, was that of *Seward*.[44] In appealing the *Industrial Relations Board*'s ruling, the Supreme Court of Nebraska held that boards of education should not be required to negotiate matters that are of predominantly educational policy. More specifically, the court held that even while there are many diverse interests involved, only matters that can be interpreted as directly affecting the teachers' welfare were negotiable. Matters beyond the realm of negotiability, and in the management sector, included the right to "hire; schedule work; control transfers and assignments; to detemine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed."[45] Tied to the *Seward* decision was the reliance on what the legislature indicated as the guiding principles under the terms and conditions of employment section of the law. Furthermore, the court was keenly aware of the need to protect the teachers on matters that had a direct impact on their welfare. The key appears to be the direct impact on the teachers as opposed to others within the district, as well as on educational policy.

While traditional school policy involving managerial prerogatives is thought to be limited to "on-school" time, the *Mainland* case saw the court expand the notion of educational policy to time after school.[46] In 1978, when a number of states had included extracurricular activities as negotiable items (when associated with extra pay provisions in contracts), the Superior Court of New Jersey ruled that these were an integral part of the learning process and fell under the umbrella of

---

43. *Id.* at 87.
44. School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 199 N.W.2d 752 (1972).
45. *Id.* at 759.
46. Mainland Regional Teachers Ass'n v. Board of Educ. of Mainland Regional School Dist., 423 A.2d 998 (1978).

management prerogatives. The court found that extracurricular activities were not really extra, but co-curricular. They were *part of the learning environment* provided by schools to enrich the learning of students and augment the standard curriculum. New Jersey, with the thorough and efficient education policy, led the court to rule that these activities were part of the curriculum and, as the board has the "duty to assign staff to educational programs and make the best assignment for the good of the education program and to provide for a thorough and efficient education program," this item was nonnegotiable.[47] Even when the impact of the board's action directly affected the welfare and working conditions of the teaching staff, the larger question was raised as to the impact of the proposal on the total education program.

This stance was reiterated by the California Supreme Court in *San Mateo*.[48] The issue was the board's position that the negotiable items were more limited than those established under the Winton Act. The court held that the Educational Employment Relations Act provided for negotiable items not limited to those found in the Act. The court held that the

> [S]ubject is negotiable, even if not specifically enumerated in the Act, if it is logically and reasonably related to wages, hours, and terms and conditions of employment; if the subject is of such concern to both management and employees that conflict is likely to occur and mediatory influence of collective negotiations is the appropriate means of resolving the conflict and if the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives, including matters of fundamental policy essential to achievement of the school district's mission.[49]

As indicated by this decision, the rights of management were left in a state of confusion over exactly what could logically be considered within the legislative prescriptions pertinent to negotiations. The decision also opened another area for our consideration, that of proper mediatory influences in the collective bargaining process. Does this mean that arbitration and arbitration decisions will also affect the management prerogatives of school districts?

Three cases deal with this issue — *Ridgefield Park*, *School Committee of Boston*, and *Iowa City Community School District*.[50] The *Ridgefield Park* case declared that the use of arbitration as a means of dispute settlement overstepped the bounds of reasonableness when the issue was one of management prerogative, even where the board had negotiated a clause calling for grievance disputes to be resolved using binding arbitration. At the same time, the board agreed to clauses dealing

47. *Id.* at 1088.
48. San Mateo City School Dist. v. PERB, 191 Cal. Rptr. 523 (1983).
49. *Id.* at 528.
50. Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 393 A.2d 278 (1978); School Committee of Boston v. Boston Teachers Ass'n, 389 N.E.2d 970 (1979); and Iowa City Community School Dist. v. Iowa City Educ. Ass'n, 343 N.W.2d 139 (1983).

with teacher transfer and reassignment. When the board violated the agreement, the association sued for relief. The Supreme Court of New Jersey held for the board, but not for the reasons that the board proposed. Determining that the items of transfer and reassignment were nonnegotiable, the court declared that as they could not be negotiable, and thus they could not be arbitrated. The board was cautioned against further negotiating of items prohibited by law. This ruling affects all school districts, as it reinforces the position of not negotiating legislative enactments, such as transfer and reassignment of teachers. Yet, the option of the use of arbitration was raised here. When might arbitration be used, and upheld by the courts, even where it impacts on managerial prerogatives? The next two cases allude to an answer.

In *School Committee of Boston v. Boston Federation of Teachers*, the issues were specific appointment and tenure decisions, as well as the school committee's decisions to abolish positions. The Supreme Court of Massachusetts ruled that these subjects were within the zone of management prerogatives, but that arbitration awards would be upheld where the issues raised were ones of adherence by the school committee to the procedures set forth in the negotiated agreement. Thus, school boards are cautioned (1) to negotiate carefully the procedures they will follow, and (2) to follow the procedures particularly where a grievance procedure ends in binding arbitration.

The *Iowa City* case further expanded the possibility of arbitration awards affecting management prerogatives, and opened the door for the use of this technique to resolve conflicts involving permissive items. This included items that were managerial prerogatives that boards of education negotiated away. In this case, the issue was the board's action of freezing a teacher's pay for unsatisfactory performance. Due to the steps in the grievance procedure, arbitration was used. The arbitrator ruled for the teacher and the board sought to have the decision overturned. In upholding the arbitration award, the court rejected the board's arguments that they alone could determine the criteria for unsatisfactory performance and that this item was not included in the list of mandatory bargaining items. Furthermore, the court expanded the list of items by declaring that the restrictive interpretation of mandatory items does not inhibit the board from voluntarily bargaining, and agreeing on, permissive topics. The decision relates to the private sector argument of the firm to permissively negotiate whatever it wants. The only strictures placed on boards of education were those items expressly prohibited to it by the legislature. The court also examined the favorable view given by the state legislature to arbitration as a means of resolving grievances. Thus, care must be exercised by school management personnel in the items that are permissively negotiated and the intertwining of these items with other portions of the negotiated agreement.

The opinion of the Iowa court, that school boards may negotiate what have been termed management prerogatives and be held accountable

for their actions if they violate the contractual arrangements, opens another area for management rights. In looking at management's responsibility to operate the city in response to the avowed governmental functions expected by the electorate, the court held that while the management was not required to negotiate matters of inherent managerial policy, it could do so on a voluntary basis.[51] Yet, when it does negotiate this area, "it must do so in clear and unmistakable language."[52] This clear and unmistakable language requirement arose in the *NEA-Wichita* case over a management rights clause that had been inserted into the contract.[53] Here the school management had negotiated a management rights clause and a closure clause that not only gave the board broad management rights, but brought closure to the negotiations process and no further negotiations would occur without mutual consent. The Supreme Court of Kansas ruled that the clauses were too broad and vague, that they extended the rights of management beyond the limits outlined within the law, and that while permissive aspects of negotiations allowed both sides to negotiate items not prohibited, the final contract had to be narrowly drafted, include the specific items, and not encompass the broad scope that was found in this particular situation. The court's rationale was that the law was meant to facilitate negotiations and not limit the rights and responsibilities of either party in maintaining the work and welfare of the employees. Thus, we see that while either side may permissively give up, negotiate, or agree to specific items that limit their powers, including managerial rights, they must neither be beyond the scope of the statutes nor be restrictive to either the policy functions of the board nor the rights of the employees.

If the school board may negotiate matters of policy, must negotiate matters pertinent to the work and welfare of the employees, and must not overstep their responsibility as a governmental policy-making body, what specific aspects must be negotiated that border upon, or fall within, the policy purview of the board? While many courts have held that management rights need not be negotiated when they directly affect the policy making requirements of the boards, the courts have held that the procedure for implementation of the policy needs to be negotiated, especially where it directly affects the employees.

In 1980, the Oregon Supreme Court dealt with the issue of teacher evaluation and the responsibility of the Employment Relations Board to expand the provisions of the negotiations act as opposed to using only the list provided in the act.[54] The court found that the three criteria established by the ERB were useful in determining the negotiability of items. The test consisted of basis and uses, mechanisms, and minimum fairness. Applying these to the issue of teacher evaluation, the ERB

51. Arrowhead Pub. Serv. Union v. City of Duluth, 336 N.W.2d 68 (1983).
52. *Id.* at 72.
53. NEA-Wichita v. Unified School Dist. No. 259, Sedgwick County, 674 P.2d 478 (1983).
54. Springfield Educ. Ass'n v. Springfield School Dist. No. 19, 621 P.2d 547 (1980).

found (and the court sustained) that under the first two criteria – basis and uses and mechanism – these were related predominantly to the educational policy functions of the school board. While these affected the employees and their work, they related primarily to the educational program of the district and were not mandatory bargaining items. They were considered permissible items at best. The rationale for this was the belief that educational policy included program standards of the curricular nature and that these were inextricably interwoven into the level of effectiveness that the board was prone to maintain as part of its management rights as program standards, and their maintenance would serve as the basis for subsequent managerial action. Thus, while the court sustained the minimum fairness procedural aspects of the teacher evaluation process, the program aspects dealing with fulfillment of the mission given the board by the electorate was reserved for its action alone.

In the *Drummond* case, the board had adopted a nepotism policy and released a bus driver under the policy.[55] The Wisconsin Employment Relations Commission held that the policy had to be negotiated as it affected hours, wages, and terms and conditions of employment. The Court of Appeals in Wisconsin, in upholding for the WERC ruling, believed that both the policy and its impact were subjects for bargaining. The court concluded that the board was required to bargain over the applicability of the policy to employees generally, rather than limiting the negotiations to the actual impact upon the only employee affected. At least, the court felt, the board must confer regarding whether it should be adopted and what it should say.

This need for negotiation of procedural aspects of policy decisions was further illuminated in the *Old Bridge Township* case.[56] While the Supreme Court of New Jersey was not concerned with the policy decision of the board to reduce its staff in the face of declining enrollments and financial exigency, the court did rule on the impact of the policy and the need to negotiate procedures. The court was concerned with the rudimentary fairness to the employees and the establishment of equitable practices to implement the policy. As the procedures affected the individual employee, and the association at large, they were declared negotiable items. Specifically, the court stated

> [T]he dominant managerial concern here is the decision to abolish the position. That cannot be negotiated. The question is whether the employees' interests in procedurally fair notice of the layoff can be balanced with the employer's interest in fiscal management.[57]

The state statutes provided for nontenured staff nonrenewal, and this was not negotiable. However, when the question involved the impact of

55. School Dist. of Drummond v. WERC, 352 N.W.2d 662 (1984).
56. Old Bridge Township Bd. of Educ. v. Old Bridge Educ. Ass'n, 489 A.2d 159 (1985).
57. *Id.* at 163.

a reduction in force, the court held that the board had to negotiate not only the procedures for RIF, but financial rewards if they were late in meeting the notification deadline. The need for fairness in dealing with the implementation of the policy did not cause interference with the governmental prerogative of operation of the district. The issue is negotiable not only when the impact of the item is greater on the employee, but also when the implementation of the policy causes that impact.

Summary

With this examination of the scope management prerogatives and the tests that are used to determine the extent to which management must negotiate specific items, just what guidelines are there for school board responsibilities in the negotiations process?

First, in examining the legislation that has been promulgated by the states, we find that the scope of bargaining ranges from narrow restrictive lists to wide-ranging general statements concerning what must, may, and must not be negotiated. While an unsettled area, the general tenor is that certain aspects in the management prerogative realm do exist. These items do include the power to direct employees; oversee budgets and allocations; provide for proper organizational structure; hire, assign, transfer, and dismiss employees; and maintain an acceptable standard for services provided by the district. The problem arises when the statutes are general and include limited guidance for school management personnel. It is in those instances that rational connections must be drawn by the school officials and other tests used to determine the scope of their powers.

The second issue follows from the legislation that states have enacted. This test is that of legislative intent. Using this as a base, the courts dealt with the issue of what constitutes management prerogatives within the scope of bargaining. The results of these analyses are that the prerogatives of management are basically broad in scope and that these include most aspects of policy making and operation of the district in fulfillment of its educational mission. In most states, the legislative intent has been read to give broad powers to the school boards and in many instances restrict the mandatory items to those specifically enumerated.

The next area was the balancing test in which courts examined issues found within the scope of bargaining and balanced the effects of the issue on various groups within the school community. This approach has led the courts to consider the governmental policy-making nature of the school board and the overall mission it is to fulfill. Furthermore, courts have examined the issues in light of the differences found between the private sector enterprise that might be permitted to negotiate away its managerial rights versus the public entity that is more restricted due to the democratic and political function it fulfills. One aspect of the balanc-

ing process does include the fairness in implementing the policy that the school board legislates.

Finally, examination of the impact test found that the courts examine the issues in dispute and determine whether the school management or the school employee is affected more by the issue. Here the courts appear to rely on the specific wording of state statutes, and on rational decision making. As long as the statutes prescribe, or limit, the realm of negotiable items, the school management team must, and may, remain within that area. The issue of fairness is the key to the rational approach used by the courts. With respect to issues that are included within the negotiated contract, and where arbitration is used to resolve contract disputes, the courts have held that they will permit such procedures as long as the outcome does not impinge upon the management prerogative of policy making.

There are some specific guidelines to the rights and prerogatives of management, and there are tests that courts use in determining management prerogatives. However, the area is still gray in terms of any definitive statement on exactly what the limits are at any specific time. On a philosophic note, it does appear from both the legislative and judicial realm that the trend is moving toward more management prerogatives and a lessening of conflict in those areas of educational/governmental policy making. Both courts and legislatures are becoming concerned with the need for the school management teams to fulfill the goals and mission demanded by the patrons of the district. To that end, decisions seem to be broadening the area of management prerogatives.